

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

UNITED STATES OF AMERICA)

v.)

Criminal No. 5:14

DONALD L. BLANKENSHIP)

DEFENDANT'S REQUEST FOR REPORT OF MOTION TO EXCLUDE EVIDENCE,
TESTIMONY, OR AFFIDAVITS RELATED TO PURSUANCE OF STATEMENTS MADE BY
DEFENDANT AFTER THE UNITED STATES

Under both Rule 16 and Rule 404(b), the government is required to provide the defense with Mr. Blankenship's post-UBIA statements and to introduce as Rule 404(b) evidence. It refuses to do so, and it may be prohibited from introducing this category of evidence at trial. In addition, the government makes no attempt to explain how uncharged statements, made after the explosion, are remotely relevant to show Mr. Blankenship's role in the partial explosion. For these reasons and the others set forth in this category of evidence must be excluded.

- a. Because the government has failed to proffer evidence pursuant to the Federal Rules of Evidence and Rule 404(b), the court must exclude it.

In response to Blankenship's appropriate objection to the efficiency of the government's government provides some – though not enough – information on the time for statements it has proffered. Specifically, the government states that it “does not offer statements from years after the explosion . . .,” but that the statements in question are from a short time after the explosion.” (ECF 330 at 9). Again, if the government knows what statements were made and when they were made, there is absolutely no

legitimate basis upon which it should continue to hide that information from the defense. The defense is still left guessing as to what the “statements in question” even are, and the defense is not able to guess by time frame because the government has only a vague description of the time after the explosion.”

The government contends that Rule 16 somehow does not require the government to disclose statements made by the defendant that it intends to use at trial. (*See* ECF 10 at 10-11). That contention is wrong. Both Rule 16(a)(1)(B) and Rule 16(d)(2)(D) require disclosure of the defendant's statements. Federal Rule of Criminal Procedure 16(a)(1)(B) provides:

Defendant's Written or Recorded Statements. Upon the defendant's request, the government must disclose, and make available for inspection, copying, or photographing,

(i) any relevant written or recorded statements made by the defendant if:

- statement is in the government's possession, custody, or control; and
- the attorney for the defendant knows—or through due diligence could know—the location of the statement.

The defense has repeatedly requested the government to disclose the statements, and the government admittedly possesses them, and the government admits they are relevant. It matters not whether the statements were made to the general public or to an individual. So long as Mr. Blankenship's statements are in an audio or video recording, transcription, or in any writing, they must be disclosed to the defense. *See United States v. [REDACTED]*, 2012 F.2d 928, 935 (10th Cir. 1997). The provisions of [Rule 16(a)(1)(B)] are clear and unambiguous . . . ; if the statements are written or recorded statements made by the defendant, and the other conditions are satisfied, the rule is clear that the Government should disclose the statements.

The government has not disclosed the statements and refuses to do so. As a result, the Court should exclude the evidence from this trial as a discovery sanction authorized by Federal Rule of Criminal Procedure 16(d)(2)(D).

The notice requirement of Federal Rule of Evidence 404(b)(2)(A) requires the government to provide “reasonable notice” of the evidence it intends to introduce under Rule 404(b). The government has not done so here. The government does not give notice requirement of what it intends to offer as Rule 404(b) evidence as to Blankenship his unidentified statements on unspecified dates. That vague disclosure does not satisfy the purpose of the notice requirement – to allow the defense to prepare to confront such evidence at trial. The Court should exclude the government’s evidence to satisfy the notice requirement of Rule 404(b).

b. The proffered evidence is irrelevant and inadmissible propensity evidence under Rule 404(b)(2)(A) and should be excluded.

The government cannot show that this category of evidence, so it has attempted to place the evidentiary burden on Blankenship. (See ECF 330 at 9) (stating that “he does not address the basis for relevance”) Mr. Blankenship’s duty to show that this evidence is irrelevant; as the government has the government’s duty to show that it is relevant and therefore admissible under Rule 404(b)(2)(A).

In attempting to show purported relevance of proffered statements, the government, in very short, argues that the evidence is relevant to show that Mr. Blankenship himself made particular statements charged in the indictment and Three “to be made.” (ECF 330 at 9) However, whether Mr. Blankenship made statements, at other times and in other contexts, says nothing about whether he made or did not make the specific statements charged in the indictment. Indeed, the preparation and execution of the indictment is a matter of written record and is reflected, with clarity, in the indictment.

“Other acts” evidence is not remotely germane to the issue.

Indeed, the use to which the government seeks to put this evidence is nearly identical to the language in Rule 404(b) that specifically prohibits admitting evidence of other acts to prove that a defendant similarly when allegedly committing the crime. The government seeks to prove that Defendant personally made statements after the explosion that are consistent with the charged statements tends to prove the superseding indictment's allegations (see F 330 at 8). Simply because Blankenship made other statements after the UBB explosion that were allegedly made by those charged in the Indictment does not make them relevant or admissible. To the contrary, it squarely places them within the category of prohibited character evidence under Rule 404(b).

The evidence is not only inadmissible but also impermissible character evidence under Rule 404(b), and the Court should exclude it.

For the foregoing reasons, Defendant respectfully requests that the Court exclude from trial all evidence, testimony, or exhibits related to the statements made by Mr. Blankenship following the UBB explosion. Alternatively, if the Court does not find that exclusion is the appropriate remedy, then the Court should order the government to comply with its obligations under Federal Criminal Procedure 16 and (1) make the statements made by Mr. Blankenship available to use at trial and (2) make the statements available to Mr. Blankenship for review and copying.

Dated: September 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing on the 1st day of September, 2015.

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